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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 Jaymie Lyn Nelson, ) No. CV 19-250-TUC-LAB  
9 Plaintiff, ) **ORDER**  
10 vs. )  
11 Commissioner of Social Security )  
12 Administration, )  
13 Defendant. )  
14

15 The plaintiff filed this action for review of the final decision of the Commissioner for  
16 Social Security pursuant to 42 U.S.C. § 405(g). (Doc. 1, p. 1)

17 The Magistrate Judge presides over this case pursuant to 28 U.S.C. § 636(c) having  
18 received the written consent of both parties. *See* FED.R.CIV.P. 73; (Doc. 13)

19 The ALJ did not provide specific, clear, and convincing reasons for discounting Nelson's  
20 subjective symptom testimony. The case is remanded for payment of benefits.

21  
22 PROCEDURAL HISTORY

23 On January 20, 2015, Nelson constructively filed an application for disability insurance  
24 benefits pursuant to Title II of the Social Security Act. (Tr. 32) She alleged disability  
25 beginning on January 31, 2013, due to depression, migraines, and DM (diabetes mellitus). (Tr.  
26 32); (Tr. 186)

27 Nelson's application was denied initially and upon reconsideration. (Tr. 32) She  
28 requested review and appeared with counsel at a hearing before Administrative Law Judge

1 (ALJ) MaryAnn Lunderman on November 28, 2017. (Tr. 49) In her decision, dated April 25,  
2 2018, the ALJ found, based on testimony by a vocational expert, that Nelson was not disabled  
3 because there are jobs that she could perform considering her age, education, work experience,  
4 and residual functional capacity (RFC). (Tr. 42) Nelson appealed, but on March 5, 2019, the  
5 Appeals Council denied review making the decision of the ALJ the final decision of the  
6 Commissioner. (Tr. 1-3) Nelson subsequently filed this action appealing that final decision.  
7 (Doc. 1)

8  
9 Claimant's Work History and Medical History

10 Nelson was 42 years old at the time of the hearing before the ALJ. (Tr. 50) She is a high  
11 school graduate and has a certificate from a technical college for medical billing and coding.  
12 (Tr. 51)

13 Nelson worked for two years with Preferred Homecare, a home care services provider.  
14 (Tr. 52-53) She "collected the medical records that were needed for the equipment they  
15 provided." (Tr. 53) She lost her job when the company moved to Phoenix. (Tr. 53)  
16 Previously, she worked for five years as an administrative assistance in a construction company.  
17 (Tr. 53) She lost that job during a downsizing. (Tr. 53) Before that, she worked for a year and  
18 a half making floral arrangements for a florist in Florida. (Tr. 53) She left that job to move to  
19 Tucson. (Tr. 53-54)

20 At the hearing, Nelson explained that she cannot work due to chronic migraines. (Tr. 54)  
21 She describes the migraines as "dull aches across my temple that work[] their way back across  
22 the top of my head." (Tr. 56) "Sometimes it'll go down my neck, through my shoulders and  
23 it goes up in severity and pain to where I can't think, I can't focus and . . . I get nausea with the  
24 majority of them and I end up needing to lay [sic] down." (Tr. 56) Since taking Botox  
25 injections, the frequency of the migraines has reduced to two to four times a week. (Tr. 57) If  
26 she has a migraine, she needs to lie down 80% of the time. (Tr. 59)

27 Vocational expert Kathleen McAlpine testified at the hearing that someone with the  
28 claimant's age and vocational and educational background with no exertional limitations but

1 who “may frequently climb ramps and stairs, occasionally ladders, ropes or scaffolding,  
2 frequently balance, stoop, bend at the waist, kneel, crouch and crawl . . . [is limited to] less than  
3 occasional, seldom or rare exposure to hazards, such as machinery and heights . . . [whose]  
4 assigned work must be limited to simple, unskilled tasks which may be learned in 30 days or  
5 less, or by brief demonstrations . . . [and] must require less than occasional, seldom or rare  
6 contact with the public, and no more than occasional contact with coworker and supervisors”  
7 could not perform any of Nelson’s past jobs. (Tr. 62) Such a person could, however, work as  
8 a packager, DOT (Dictionary of Occupational Titles) #920.587-018, stock clerk, DOT  
9 #922.687-058, or janitor cleaner, DOT #323.687-014. (Tr. 62)

10  
11 *Medical Record*

12 In May of 2015, Raymond Novak, M.D., reviewed the medical record for the disability  
13 determination service and offered an opinion of Nelson’s mental impairment. (Tr. 71) Novak  
14 considered the diagnosis of affective disorder. (Tr. 70) He then evaluated Nelson’s “B” listing  
15 criteria, which gauge the severity of her limitations. *See* 20 C.F.R. § 404.1520a(c)(3). Novak  
16 found that Nelson has “mild” restrictions of activities of daily living; “moderate” difficulties  
17 in maintaining social functioning; “moderate” difficulties in maintaining concentration,  
18 persistence, or pace; and no episodes of decompensation. (Tr. 70) Novak further opined that  
19 the medical evidence did not establish the presence of the “C” criteria, which are an alternative  
20 gauge of the extent of her functional limitations. (Tr. 70)

21 Novak completed a mental residual functional capacity assessment. (Tr. 73-75) He  
22 concluded that Nelson’s ability to understand and remember detailed instructions, ability to  
23 carry out detailed instructions, ability to complete a normal workday and workweek, and ability  
24 to interact appropriately with the general public are moderately limited. (Tr. 74)

25 In May of 2015, John B. Kurtin, M.D., reviewed the medical record for the disability  
26 determination service and offered an opinion of Nelson’s residual functional capacity. (Tr. 72-  
27 73) Kurtin opined that Nelson has no exertional limitations. (Tr. 72) She should only  
28 occasionally climb ladders, ropes, or scaffolds. *Id.* She should only frequently climb ramps and

1 stairs. *Id.* She should avoid concentrated exposure to hazards such as machinery and heights.  
2 (Tr. 73)

3 In October of 2015, on reconsideration, Alan Goldberg, Psy.D. and Nick J. Mansour,  
4 M.D., reviewed the medical record for the disability determination service. (Tr. 86-91)  
5 Goldberg's assessment was materially the same as Novak's. *Id.* Mansour's assessment was  
6 similar to Kurtin's with the additional limitations that Nelson should only frequently balance,  
7 stoop, kneel, crouch, or crawl. *Id.*

### 8 9 CLAIM EVALUATION

10 Social Security Administration (SSA) regulations require that disability claims be  
11 evaluated pursuant to a five-step sequential process. 20 C.F.R. § 404.1520. The first step  
12 requires a determination of whether the claimant is engaged in substantial gainful activity. 20  
13 C.F.R. § 404.1520(a)(4). If so, then the claimant is not disabled, and benefits are denied. *Id.*

14 If the claimant is not engaged in substantial gainful activity, the ALJ proceeds to step  
15 two, which requires a determination of whether the claimant has a severe impairment or  
16 combination of impairments. 20 C.F.R. § 404.1520(a)(4). In making a determination at step  
17 two, the ALJ uses medical evidence to consider whether the claimant's impairment significantly  
18 limits or restricts his or her physical or mental ability to do basic work activities. *Id.* If the ALJ  
19 concludes the impairment is not severe, the claim is denied. *Id.*

20 Upon a finding of severity, the ALJ proceeds to step three, which requires a  
21 determination of whether the impairment meets or equals one of several listed impairments that  
22 the Commissioner acknowledges are so limiting as to preclude substantial gainful activity. 20  
23 C.F.R. § 404.1520(a)(4); 20 C.F.R. Pt. 404, Subpt. P, App.1. If the claimant's impairment  
24 meets or equals one of the listed impairments, the claimant is presumed to be disabled, and no  
25 further inquiry is necessary. *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9<sup>th</sup> Cir. 2017). If the  
26 claimant's impairment does not meet or equal a listed impairment, evaluation proceeds to the  
27 next step.

1 The fourth step requires the ALJ to consider whether the claimant has sufficient residual  
2 functional capacity (RFC)<sup>1</sup> to perform past relevant work. 20 C.F.R. § 404.1520(a)(4). If yes,  
3 then the claim is denied. *Id.* If the claimant cannot perform any past relevant work, then the  
4 ALJ must move to the fifth step, which requires consideration of the claimant's RFC to perform  
5 other substantial gainful work in the national economy in view of the claimant's age, education,  
6 and work experience. 20 C.F.R. § 404.1520(a)(4).

7  
8 The ALJ's Findings

9 At step one of the disability analysis, the ALJ found Nelson "has not engaged in  
10 substantial gainful activity since January 31, 2013, the alleged onset date. . . ." (Tr. 34) At step  
11 two, she found Nelson "has the following severe impairments: (1) hypoglycemia, (2) migraine  
12 headaches, (3) depression and (4) anxiety. . . ." (Tr. 34)

13 At step three, the ALJ found Nelson "does not have an impairment or combination of  
14 impairments that meets or medically equals the severity of one of the listed impairments in 20  
15 CFR Part 404, Subpart P, Appendix 1 . . . ."

16 The ALJ then analyzed Nelson's residual functional capacity (RFC). She found that  
17 Nelson has the following:

18 [T]he residual functional capacity to perform a full range of work at all exertional  
19 levels but with certain nonexertional limitations. Specifically, [] the climbing of  
20 ramps and stairs must be limited to frequently while the climbing of ladders,  
21 ropes or scaffolds must be further limited to occasionally. Balancing, stooping  
22 (bending at the waist), kneeling, crouching, and crawling must be limited to  
23 frequently. Further, within the assigned work area, there must be less than  
occasional (seldom to rare), exposure to hazards, such as machinery and heights.  
In addition, assigned work must be limited to simple, unskilled tasks learned in  
30 days or less or by brief demonstration. The assigned tasks must require less  
than occasional, seldom to rare, contact with the public and no more than  
occasional contact with coworkers and supervisors.

24 (Tr. 38)

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28 <sup>1</sup> Residual functional capacity is defined as that which an individual can still do despite  
his or her limitations. 20 C.F.R. § 404.1545.

1 At step four, the ALJ found that Nelson is unable to perform any past relevant work. (Tr.  
2 40) At step five, the ALJ found, based on the testimony of the vocational expert, that  
3 considering her age, education, work experience, and residual functional capacity, Chapman  
4 could work as a packager, DOT #920.587-018, stock clerk, DOT #922.687-058, or janitor  
5 cleaner, DOT #323.687-014. (Tr. 42) Accordingly, the ALJ found that Nelson is not disabled.

#### 6 7 STANDARD OF REVIEW

8 To qualify for disability benefits the claimant must demonstrate, through medically  
9 acceptable clinical or laboratory standards, an inability to engage in substantial gainful activity  
10 due to a physical or mental impairment that can be expected to last for a continuous period of  
11 at least twelve months. 42 U.S.C. § 423(d)(1)(A). “An individual shall be determined to be  
12 under a disability only if h[er] physical or mental impairment or impairments are of such  
13 severity that [s]he is not only unable to do h[er] previous work but cannot, considering h[er]  
14 age, education, and work experience, engage in any other kind of substantial gainful work  
15 which exists in the national economy, regardless of whether such work exists in the immediate  
16 area in which [s]he lives, or whether a specific job vacancy exists for h[er] or whether [s]he  
17 would be hired if [s]he applied for work.” 42 U.S.C. § 423(d)(2)(A).

18 The findings of the Commissioner are meant to be conclusive. 42 U.S.C. § 405(g). The  
19 decision to deny benefits “should be upheld unless it contains legal error or is not supported by  
20 substantial evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9<sup>th</sup> Cir. 2007). Substantial evidence  
21 is defined as “such relevant evidence as a reasonable mind might accept as adequate to support  
22 a conclusion.” *Id.* It is “more than a mere scintilla but less than a preponderance.” *Id.*

23 “Where evidence is susceptible to more than one rational interpretation, the  
24 [Commissioner’s] decision should be upheld.” *Orn*, 495 F.3d at 630. “However, a reviewing  
25 court must consider the entire record as a whole and may not affirm simply by isolating a  
26 specific quantum of supporting evidence.” *Id.*

#### 27 28 Discussion

1 Nelson argues first that the ALJ improperly discounted her subjective testimony of  
2 disabling pain. She is correct; this action will be remanded for payment of benefits. The court  
3 does not reach Nelson’s alternate claims of error.

4 “When an Administrative Law Judge (ALJ) determines that a claimant for Social  
5 Security benefits is not malingering and has provided objective medical evidence of an  
6 underlying impairment which might reasonably produce the pain or other symptoms she alleges,  
7 the ALJ may reject the claimant’s testimony about the severity of those symptoms only by  
8 providing specific, clear, and convincing<sup>2</sup> reasons for doing so.” *Brown-Hunter v. Colvin*, 806  
9 F.3d 487, 488–89 (9<sup>th</sup> Cir. 2015). “[A]n ALJ does not provide specific, clear, and convincing  
10 reasons for rejecting a claimant’s testimony by simply reciting the medical evidence in support  
11 of his or her residual functional capacity determination.” *Id.* at 489. “To ensure that . . . the  
12 ALJ’s credibility determination is meaningful, and that the claimant’s testimony is not rejected  
13 arbitrarily, . . . the ALJ [must] specify which testimony she finds not credible, and then provide  
14 clear and convincing reasons, supported by evidence in the record, to support that credibility  
15 determination.” *Id.*

16 In this case, the ALJ analyzed Nelson’s subjective testimony and offered specific reasons  
17 for discounting her testimony of disabling pain. The court examines those reasons in turn.

18 First, the ALJ stated that Nelson’s subjective testimony should be discounted because  
19 clinical evidence does not support the severity of her symptoms. The ALJ stated as follows:

20 While the claimant complains of severe migraine headaches, clinical findings fail  
21 to identify abnormalities corroborating the severity of the claimant’s subjective  
22 complaints. The absence of corroborating evidence suggests the claimant’s  
23 symptoms are not as severe as alleged. Physical examination confirms the  
claimant is well developed and nourished, in no acute distress and with no focal  
deficits.<sup>3</sup> Upon physical examination, the head and neck reveal no central pain,

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25 <sup>2</sup> The Commissioner “maintains that this standard is inconsistent with the deferential  
26 substantial evidence standard set forth in 42 U.S.C. s 405(g) and with agency regulations and  
ruling” but acknowledges that this is the standard in the Ninth Circuit. (Doc. 25, p. 6, n. 4)

27 <sup>3</sup> A “problem with nerve, spinal cord, or brain function” that “affects a specific location  
28 such as the left side of the face, right arm, or even a small area such as the tongue.”  
<https://medlineplus.gov/ency/article/003191.htm>.

1 normal sensations, no increase in muscle tone or weakness and normal range of  
2 motion. Neurological examinations revealed no focal deficits and extra ocular  
movements are intact with no ptosis<sup>4</sup>. . . .

3 (Tr. 38) The ALJ's approach is contrary to the case law in the Ninth Circuit.

4 "To determine whether a claimant's testimony regarding subjective pain or symptoms  
5 is credible, an ALJ must engage in a two-step analysis." *Lingenfelter v. Astrue*, 504 F.3d 1028,  
6 1035–36 (9<sup>th</sup> Cir. 2007). "First, the ALJ must determine whether the claimant has presented  
7 objective medical evidence of an underlying impairment which could reasonably be expected  
8 to produce the pain or other symptoms alleged." *Id.* at 1036 (punctuation modified) "Second,  
9 if the claimant meets this first test, and there is no evidence of malingering, the ALJ can reject  
10 the claimant's testimony about the severity of her symptoms only by offering specific, clear and  
11 convincing reasons for doing so." *Id.*

12 "The claimant, however, need not show that her impairment could reasonably be  
13 expected to cause the *severity* of the symptom she has alleged; she need only show that it could  
14 reasonably have caused some degree of the symptom." *Lingenfelter v. Astrue*, 504 F.3d 1028,  
15 1035–36 (9<sup>th</sup> Cir. 2007) (emphasis added). "Thus, the ALJ may not reject subjective symptom  
16 testimony . . . simply because there is no showing that the impairment can reasonably produce  
17 the *degree* of symptom alleged." *Id.* (emphasis added) In other words, "[o]nce the claimant  
18 produces medical evidence of an underlying impairment, the [ALJ] may not discredit the  
19 claimant's testimony as to the severity of symptoms merely because they are unsupported by  
20 objective medical evidence." *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998).

21 Here, the ALJ found that objective medical evidence established that Nelson suffered  
22 from migraine headaches. She made no finding of malingering. Nevertheless, she discredited  
23 Nelson's testimony as to the severity of her symptoms because Nelson could not produce  
24 "clinical findings" of "abnormalities corroborating the severity of [her] subjective complaints."  
25 (Tr. 38) The ALJ's rationale is contrary to the law in the Ninth Circuit. A claimant is not  
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27 <sup>4</sup> "Ptosis is when the upper eyelid droops over the eye." [https://aao.org/eye-](https://aao.org/eye-health/diseases/what-is-ptosis)  
28 [health/diseases/what-is-ptosis](https://aao.org/eye-health/diseases/what-is-ptosis).



1 required to produce objective evidence establishing the severity of her symptoms. *Reddick v.*  
2 *Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998); *see also Thomas v. Colvin*, 2015 WL 4067147, at  
3 \*7 (W.D. Pa. 2015) (“[M]igraine headaches cannot be detected by imaging techniques,  
4 laboratory tests, or physical examination.”) (punctuation modified).

5 The second reason given by the ALJ for discounting Nelson’s subjective testimony  
6 involves a suspicious lack of headache reports in the medical record. The ALJ’s decision reads  
7 as follows:

8 More importantly, despite the allegation of constant headaches, the evidence  
9 reflects the claimant’s routine denial of headaches during review of systems.  
10 7F/28, 41, 48, 76, 83, 94, 95. Such evidence suggests migraine headaches do not  
cause an impairment as severe as the claimant alleged.

11 (Tr. 38) At first blush, it might seem strange that a person afflicted with disabling migraine  
12 headaches should so often report that she has no headaches. An examination of these records,  
13 however, puts Nelson’s “routine denial[s]” into some perspective.

14 The ALJ cites seven specific visits that Nelson made to her primary care provider.  
15 These treatments, however, were for complaints apart from her chronic migraine headaches.  
16 The record at 7F/28, for example, describes a medical procedure for “removal and reinsertion  
17 of intrauterine contraceptive device.” (Tr. 497) The record does state that Nelson “denies  
18 dizziness, headaches, and weakness.” (Tr. 497) But this denial is in a section that describes,  
19 in a general way, Nelson’s overall health status. (Doc. 497) This section lists general denials  
20 of “fever, chills, abnormal weight gain, abnormal weight loss, fatigue, chest pain, palpitations,”  
21 et cetera. (Tr. 497) In fact, that section lists in an entirely perfunctory manner some 20  
22 different symptoms that Nelson “denies.” (Tr. 497) Taken in context, it appears that this  
23 section is not meant to be a considered diagnosis of Nelson’s migraine headaches. Instead, it  
24 is a survey of her acute symptoms designed to enable her physician to accurately and  
25 specifically diagnosis and treat the complaint for which Nelson seeks treatment on that  
26 particular day. In fact, on the first page of that medical record, 7F/25, the treating physician  
27 states that among Nelson’s “Current Problems (verified)” there is still outstanding “Anxiety .  
28 . . Depression . . . Migraine . . . [and] Diabetes Mellitus.” (Tr. 494) The fact that Nelson did

1 not complain of migraine headaches on a day that she sought treatment for her intrauterine  
2 contraceptive device is not particularly persuasive evidence for discounting her subjective  
3 testimony of disability.

4 The other six medical reports tell the same story. Record 7F/41 also contains a “denial”  
5 of “headaches” but on the first page of that report, the treating physician records “Migraine” in  
6 the “Current Problems (verified)” section.” (Tr. 507, 510) On that day, Nelson was due for a  
7 “Follow-up Visit” for her “diabetes.” (Tr. 507)

8 Records 7F/48, 76, 83, 94, and 95 also contain a denial of headaches but in the same  
9 medical report, the treating physician records “Migraine” as a current problem. (Tr. 516, 544,  
10 550, 562) On those days, Nelson presented for a gynecological exam (vaginal discharge), a  
11 follow-up for flu shot and diabetes, DKA (diabetic ketoacidosis), and dizziness (Tr. 516, 544,  
12 550, 562) The fact that Nelson did not complain of migraine headaches on those days that she  
13 sought medical treatment for a different condition is not strong evidence for discounting her  
14 subjective testimony of disability. *See, e.g., Widmark v. Barnhart*, 454 F.3d 1063, 1068 (9th  
15 Cir. 2006) (“[N]o reasonable person would expect a podiatrist seeing a patient who complains  
16 of foot problems to thoroughly examine the full range of that patient’s hearing. . . .”).

17 Later in her decision, the ALJ concedes that there is evidence of headaches in the  
18 medical record. (Tr. 30) She notes, however, that Nelson’s “concentration and memory  
19 consistently was described as intact.” (Tr. 39) (citing 16 locations in the medical record)  
20 Moreover, she notes that “the evidence reflects the claimant’s routine denials of nausea.” (Tr.  
21 39) (citing 14 locations in the medical record) The ALJ considered these reports inconsistent  
22 with Nelson’s “statements about the intensity, persistence, and limiting effects of [her]  
23 symptoms.” (Tr. 39) Again, an examination of the medical record puts these reports into  
24 perspective.

25 As the court noted above, these notations tend to appear in the medical record in a  
26 section that lists Nelson’s health status in a general way. They appear to be a type of  
27 preliminary screening that occurs as a matter of course before the treating physician actually  
28 attempts to diagnose and treat the particular condition that was the reason for Nelson’s visit.

1 Accordingly, the fact that Nelson did not complain of migraine symptoms headaches on those  
2 days that she sought medical treatment for a different condition is not strong evidence for  
3 discounting her subjective testimony of disability.

4 Moreover, the ALJ does not account for the episodic nature of her symptoms. Nelson  
5 testified that, at the time of the hearing, she was getting migraines two to four times a week.  
6 (Tr. 57) That means, of course, that three to five days a week, she does not have a migraine.  
7 The medical record in this case contains more than five hundred pages of reports. (Tr. 267-813)  
8 Assuming Nelson was without migraines approximately half of the time, it is not particularly  
9 surprising that the medical record would contain numerous reports of days when Nelson was  
10 without nausea or without mental fuzziness. And, of course, the medical record would display  
11 a certain bias against recording migraine symptoms because if Nelson had a full-blown  
12 migraine, she would probably cancel her medical appointments for that day. The exception to  
13 that rule would be those days when her symptoms were so unbearable that she had to report to  
14 the emergency room for relief. The medical record indicates that she did so twice in January  
15 of 2013 and once in February of 2013. (Tr. 308-310, 335-339, 300-302)

16 In her response, the Commissioner argues that these records are “inconsistencies in the  
17 evidence” that depict “conflicts between [Nelson’s] statements and the rest of the evidence.”  
18 The court does not agree. It is not “inconsistent” for the medical record to contain reports of  
19 symptom-free days where the claimant alleges symptoms that wax and wane. *See, e.g.,*  
20 *Garrison v. Colvin*, 759 F.3d 995, 1017 (9<sup>th</sup> Cir. 2014) (“As we have emphasized while  
21 discussing mental health issues, it is error to reject a claimant’s testimony merely because  
22 symptoms wax and wane in the course of treatment.”); *Lester v. Chater*, 81 F.3d 821, 833 (9<sup>th</sup>  
23 Cir. 1995) (“Occasional symptom-free periods—and even the sporadic ability to work—are not  
24 inconsistent with disability.”).

25 Another reason given by the ALJ for discounting Nelson’s subjective testimony is her  
26 reported daily activities. (Tr. 39) According to the ALJ, Nelson “reported she makes foods,  
27 like French toast, spaghetti and tacos, watches television, reads, uses a computer and works on  
28 crochet projects throughout the day.” (Tr. 39) The ALJ concluded that “[d]espite the

1 established impairments, the record reflects that claimant continues to engage in a somewhat  
2 normal level of daily activity and interaction with others.” (Tr. 39) Later in her decision, the  
3 ALJ conceded that “I do acknowledge with prompting from the appointed representative, the  
4 claimant reported such activities were indeed limited when experiencing severe migraines.”  
5 (Tr. 39) Nevertheless, she found that Nelson’s statements “are largely inconsistent with  
6 objective medical findings and other evidence admitted into this record.” (Tr. 39) The ALJ did  
7 not explain, however, why Nelson’s ability to “engage in a somewhat normal level of daily  
8 activity” on those days when she *was not* having a migraine was relevant evidence on the  
9 severity of her limitations on those days when she *was* having a migraine. *See, e.g., Thomas*  
10 *v. Colvin*, 2015 WL 4067147, at \*6 (W.D. Pa. 2015) (“Plaintiff’s ability . . . to perform some  
11 limited household duties and hobbies when not experiencing migraines is not evidence that she  
12 is able to work full time day in and day out, in the sometimes competitive and stressful  
13 conditions in which real people work in the real world.”).

14 Finally, the ALJ referenced the third party function report completed by Nelson’s  
15 mother, Wendy Nelson (Wendy). (Tr. 39) Wendy reported that Nelson “cares for her two  
16 children and animals.” (Tr. 40) She further stated that Nelson “has no issues performing  
17 personal care,” “manages her own finances and shops using the computer,” and “takes her  
18 children bowling every Saturday.” (Tr. 40) According to the ALJ, this report “provides insight  
19 into the claimant’s activities as well as to the extent of her residual functional limitations.” (Tr.  
20 40) The ALJ did not, however, cite Wendy’s numerous qualifying statements.

21 For example, Wendy stated that Nelson cares for two children, but she also said that  
22 Nelson “[t]ries to help them with everyday challenges, but most of the time she can’t deal with  
23 them because of the migraines [and] depression.” (Tr. 200) Wendy reported that Nelson has  
24 no problem with personal care, but she explained that “her migraines make her not want to.”  
25 (Tr. 200) She further stated that Nelson does not prepare her own meals because “her migraines  
26 and depression make her not want to get out of bed.” (Tr. 201) Wendy related that she and  
27 Nelson “take her kids bowling every Sat[urday] morn[ing] [and] every Sunday they come to our  
28 house.” (Tr. 203) She then qualified her statement by saying that Nelson does these things “2

1 days a week when migraines allow.” (Tr. 203) The court finds that Wendy’s third party  
2 function report is not particularly strong evidence for discounting Nelson’s subjective testimony  
3 of disability. The court concludes that while the ALJ has provided some evidence to discount  
4 Nelson’s subjective testimony of disabling limitations, she has not provided “clear and  
5 convincing” evidence. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1035–36 (9<sup>th</sup> Cir. 2007). The  
6 final decision of the Commissioner must be reversed.

7 Ordinarily, if the Commissioner is reversed, the court should remand for further  
8 administrative proceedings. The court may, however, remand for payment of benefits if “(1)  
9 the record has been fully developed and further administrative proceedings would serve no  
10 useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting  
11 evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited  
12 evidence were credited as true, the ALJ would be required to find the claimant disabled on  
13 remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020 (9<sup>th</sup> Cir. 2014).

14 Here, all three requirements are fulfilled. “The record has been fully developed and  
15 further administrative proceedings would serve no useful purpose.” *Garrison*, 759 F.3d at  
16 1020. As the Ninth Circuit observed in *Garrison*, “our precedent and the objectives of the  
17 credit-as-true rule foreclose the argument that a remand for the purpose of allowing the ALJ to  
18 have a mulligan qualifies as a remand for a ‘useful purpose’ under the first part of credit-as-true  
19 analysis.” *Garrison v. Colvin*, 759 F.3d 995, 1021-1022 (9<sup>th</sup> Cir. 2014)

20 Second, the ALJ failed to provide specific, clear, and convincing reasons for discounting  
21 Nelson’s subjective testimony of the extent of her pain. *See Brown-Hunter v. Colvin*, 806 F.3d  
22 487, 488–89 (9<sup>th</sup> Cir. 2015). Third, if Nelson’s testimony were credited as true, she necessarily  
23 would be found disabled. Nelson testified that she has migraines to two to four times a week  
24 and she needs to lie down 80% of the time. (Tr. 57, 59) And the vocational expert testified that  
25 no jobs would allow a person to miss work or leave early two times per week. (Tr. 63)

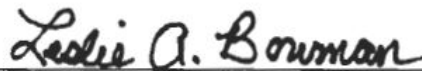
26 All three parts of the *Garrison* test are fulfilled. Furthermore, the court has examined  
27 the entire record and finds no reason to seriously doubt that Nelson is disabled. *See Garrison*,  
28 759 F.3d at 1022-23. Accordingly, this case will be remanded for payment of benefits. *See also*

1 *Benecke v. Barnhart*, 379 F.3d 587, 595 (9<sup>th</sup> Cir. 2004) (“Allowing the Commissioner to decide  
2 the issue again would create an unfair ‘heads we win; tails, let’s play again’ system of disability  
3 benefits adjudication.”).

4 IT IS ORDERED that the final decision of the Commissioner is reversed. The case is  
5 remanded for payment of benefits.

6 The Clerk of the Court is directed to prepare a judgment and close this case.  
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8 DATED this 20<sup>th</sup> day of February, 2020.  
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19 Leslie A. Bowman  
20 United States Magistrate Judge  
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